NO. 80-545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DELORES C. LOWREY,

Appellant

VERSUS

M. MORRIS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

CHARLES H. REID
P.O. Box 1244
Hattiesburg, Mississippi 39401
(601) 545 - 3113

ATTORNEY FOR APPELLEE

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M. Morris, Appellee, moves the Court to dismiss the appeal filed herein, or in the alternative, to affirm the final judgment of the Mississippi Supreme Court, dated June 4, 1980, on the ground that it is manifest that the question on which the decision of this case depends is so insubstantial as to need no further argument.

I.

STATUTES INVOLVED

This appeal questions the validity of portions of Section 21-33-61 and 27-45-11 *Miss. Code Ann. of 1972,* which it is undisputed, then required no statutory notice from municipalities to the owners of land sold for taxes of the expiration of a two year redemption period.

This appeal also questions the validity of Section 27-41-55 *Miss. Code Ann. of 1972,* which it is undisputed required "publication in a newspaper published in the county for at least three weeks that the taxes on property are due and the arrears have not been paid with a description of the land."

II.

NATURE OF THE CASE

In February of 1975, the Appellee herein filed a Complaint to confirm his title to a lot in Gulfport, Mississippi. The Appellee's title was based on a tax sale for delinquent annual municipal taxes for the year of 1972, which attached as a lien on the property on January 1, 1972. Prior to the sale, notice was published in the manner required by law. The two year period of redemption expired without the property being redeemed. Prior to the expiration of the redemption period, notice by registered mail was mailed to Ben Pritchard, the person assessed with taxes for the year 1972 and the legal and record owner of said property at the time that the lien attached. It is also undisputed that Ben Pritchard received the notice that the redemption period was about to expire. It is also undisputed that the Appellant, or anyone acting in her behalf, did not notify the City of Gulfport, Mississippi, of her interest in the property or her address; nor did she, or anyone acting for her, make any attempt to ascertain the taxes due to

the City of Gulfport, Mississippi, or attempt to pay the taxes to the City of Gulfport, Mississippi.

Service of process was had on the Appellant by publication for three successive weeks and by registered mail to Appellant's current address. After a default judgment was rendered in March 1976, the Appellee conveyed the property to a bona fide innocent purchaser for value. The Appellant filed a Petition for Rehearing in March of 1977 to set aside the tax deed. After the property was removed from the suit because of its purchase by an innocent party, the Appellant amended her Petition for Rehearing praying for restitution. Upon the conclusion of Appellant's testimony, the trial court sustained a motion for a directed verdict and dismissed Appellant's Petition for Rehearing. Upon Appeal to the Mississippi Supreme Court, the trial court's judgment was affirmed without opinion. No petition for rehearing was submitted to the full panel of the Mississippi Supreme Court.

Appellant then appealed to the Supreme Court of the United States pursuant to 28 U.S.C. §1257(2) maintaining that she had been deprived of her property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

III.

ARGUMENT

Appellee contends that the question on appeal (i.e. the constitutionality of Sections 27-33-61, 27-45-11 and 27-41-55 of the *Miss. Code Ann. of 1972)* is so wanting in substance as to require no further argument to the Court.

The major focus of Appellant's argument is that based upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court should completely abandon the distinction between actions in personam and actions in rem and should

reject the "caretaker theory" and should require more notice to the owner than was required or received in the case at bar.

However, the Appellant's argument has been continously rejected by this Court.

Even in ***Mullane v. Central Hanover Bank & Trust Co.***, this Court held that constructive notice by publication was sufficient to satisfy due process requirements where the interest or addresses of the trust beneficiaries are unknown to the trustee. Where the names and post office addresses of the trust beneficiaries were known to the trustee, it was also held that notice by mail was sufficient to satisfy due process requirements.

This Court has had several opportunities to apply this theory to tax sales. However, the Court in both ***Paschall v. Christie-Stewart, Inc.***, 414 U.S. 100 (1973) and ***Botens v. Aronauer***, 414 U.S. 1059 (1973) declined to do so. In ***Christie-Stewart, Inc. v. Paschall***, 502 P. 2d 1265 (Olka. 1972) the Supreme Court of Oklahoma held that every person who owned an interest to land in Oklahoma is charged with knowledge that land is subject to an ad valorem tax and that land may be sold in the manner provided by law without any requirement that the owner receive notice of the tax sale. The Court also held that the tax collector was under no duty to search the County Clerk's records to ascertain the owners of land. In ***Botens v. Aronauer***, 298 N. E. 2d 73 (New York 1973) the Court of Appeals of New York held that personal or direct notice of impending tax sale or of notice of redemption need not be given to the owner and indirect notice is sufficient for all parties interested in property which is in default in payment of taxes and foliowed the holding of ***North Laramie Land Co. v. Hoffman***, 268 U.S. 276 (1925) that "such statutes are universally in force and are generally in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it."

The New York case also distinguished tax sale cases from *Mullane v. Central Hanover Trust Co.* 339 U.S. 306(1959) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) where indirect notice by either publication or posting was held invalid for the reason that the individuals had no reason to expect that their property interests were being affected and such is not the situation in tax sale cases.

In the case at bar, Ben Pritchard was the record owner of the land in question when the lien attached and he was the person assessed with the taxes. The Appellant in her deed assumed the obligation of paying the taxes. Ben Pritchard actually received a written notice from the City of Gulfport, Mississippi, that the property had been sold for taxes and that the redemption period was about to expire. The Appellant apparently contends that the City of Gulfport, Mississippi, had an affirmative duty of ascertaining whether the name and address listed on its tax roles was correct. However, in *Mullane v. Central Hanover Bank & Trust Co.*, "the Court recognized that administrative limitations might hamper notification efforts, and stated that "impractical and extended searches are not required in the name of due process." 339 U.S. 306, 317-18. Also, the Appellant apparently relies upon the notion that the validity of the notice of the tax sale and expiration of the redemption period must be judged by the notice prescribed by the statute, and not by that which may have actually been given. *Wuchter v. Pizutti*, 276 U.S. 13(1928). However, this position seems to have been abandoned by the Court in *Botens v. Aronauer*, 414 U.S. 1059 (1973) dismissing appeal from 298 N.E. 2d 73(1973). Although the case involved a challenge to a statute which prescribed only published notice, it was dismissed for want of a substantial federal question because, as here, notice by mail was actually sent. *City of Atlantic City v. Block C-11, Lot 11*, 376 A. 2d 928 (1977). That case and the present case are distinguishable from *Township of Montville v. Block 69, Lot 10*, 376 A. 2d 909 (1977) because notice by mail was actually sent to the person assessed with

the taxes.

It should also be pointed out that the present case as well as the case cited by Appellant, *Umatilla County v. Porter*, 507 P. 2d 406 (Ore. 1973) are distinguishable from *Scoggin v. Schrunk*, 344 F. Supp. 463 (D. Ore. 1972) in that the assessment was an annual assessment which the taxpayer should have expected and was not a special assessment. Several reasons were given in that case for treating due process requirements different in tax sale cases than ordinary cases:

(1) the nature of taxation,
(2) The fact that tax obligations are imposed under public statutes with which the property owner is presumably familiar,
(3) the regular recurrent assessment of taxes, and
(4) the property owner's duty to the taxing unit, the demands of due process yield less for the property owner in tax foreclosure suits than in cases involving private obligations.

Also see *Knapp v. Josephine County*, 235 P. 2d 564 (Ore. 1951).

At the time of the tax sale and throughout the redemption period there was no statutory requirement imposing a duty on municipalities to give owners or any other person notice of the expiration of the redemption period. There is such a requirement now, namely Section 27-43-4, *Miss. Code Ann. of 1972*, as Amended, and effective October 1, 1975.

In a recent case *Associates Capital Corp. v. Alexander*, 374 So. 2d 218 (Miss. 1979) the Mississippi Supreme Court held:

> "We are of the opinion that failure to notice the Hayes and failure to notice the lienholders did not render

> the tax title of Saucier and Sakalarios void for the reason that there was no statute requiring such notice in municipal tax sales, that the chancellor correctly dismissed the Bill of Complaint and confirmed the title of Sakalarios and that judgment should be affirmed in that respect." (374 So. 2d at 221)

The law of Mississippi is also quite clear that the validity of a tax sale must be determined by the law in force at the time the sale was made. See ***Everett v. Williamson***, 143 So. 690 (Miss. 1932) and ***Reid v. Federal Land Bank of New Orleans***, 148 So. 392 (Miss. 1933). Any change in the statutory requirements of notice prior to the expiration of the redemption period has no effect once the tax sale has been made. See ***Price v. Harley***, 142 Miss. 584, 107 So. 673 (1926). The United States Supreme Court followed the case of ***Price v. Harley*** in the case of ***Wood v. Lovett***, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404 (1941) and said:

> "The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at a tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract."

Article 4, §79 of the ***Mississippi Constitution*** provides only that the right of redemption shall be preserved for at least two years, to-wit:

> "The legislature shall provide by law for the sale of all deliquent tax lands. The courts shall apply the same liberal principles in favor of such titles as in sale by execution. The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments, of any and every character whatsoever, shall exist, on conditions to be prescribed by law,

in favor of owners and persons interested in such real estate, for a period of not less than two years."

The assessment, levy and sale of said property by the City of Gulfport for the year 1972 did not constitute a taking of Appellant's property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Ample provision was provided for by the laws of Mississippi for the Appellant to object to the assessment of said property for taxation. Section 21-33-29 of the ***Miss. Code Ann. of 1972,*** provides that when the tax rolls have been equalized, the governing authorities shall give ten (10) days by publication in a legal newspaper in the municipality of notice of the regular or special meeting at which objections to such assessments will be heard. Section 21-33-33 of the ***Miss. Code Ann. of 1972,*** provides that each municipality shall hold a meeting on the date specified in the notice required by Section 21-33-29, to hear objections to the real and personal tax rolls and the assessments contained therein. Also provision is made under Section 21-33-47 of the ***Miss. Code Ann. of 1972*** that a notice of the tax levy shall be published within ten (10) days after its adoption in a newspaper published in the municipality. Section 21-33-63 of the ***Miss. Code Ann. of 1972***, provides that the sale of real estate for ad valorem shall be made upon the same notice, at the same time, and in the same manner as provided for by law for sales of like property for unpaid state and county taxes. Section 27-41-55 of the ***Miss. Code Ann. of 1972***, and which is made applicable by Section 21-33-63 to municipal tax sales provides for publication in a newspaper published in the county for at least three weeks that the taxes on property are due and the arrears have not been paid with a description of the land.

It is clear that the Appellant was not deprived of fundamental due process. Ample provisions were made under the laws of Mississippi from the date of assessment, January 1,

1972, throughout the two year redemption period which expired on September 17, 1975; that reasonable notice was given to the Appellant that taxes were due on said property and that said property would be sold to satisfy the tax lien.

Objection cannot be made under due process that these notices were by publication and not personal.

> "That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and at the time at which various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers due process of law." ***Winona & St. Peter Land Co. v. Minnesota,*** 159 U.S. 247 at 251, 16 S. Ct. 83, 40 L. Ed. 247 (1895).

In the present case, the Appellant had the right to appear before the City of Gulfport and object to her assessment when the tax rolls for the City of Gulfport were being equalized under Sections 21-33-29 and 21-33-31 of the ***Mississippi Code of 1972***.

The United States Supreme Court held in ***Hodge v. Muscantine County,*** 196 U.S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905) that if a taxpayer be given an opportunity to test the validity of a tax at any time before it is made final whether the proceedings for a review take place before a board having a quasi-judicial character, or before a tribunal provided by statute for the purpose of determining such question, due process of law is not denied.

The United States Supreme Court held in ***Longyear v. Toolan***, 209 U.S. 414, 28 S. Ct. 506, 52 L. Ed. 8591 (1908), that the notice by publication of the pendency of proceedings to sell land to satisfy a lien for unpaid taxes satisfies the require-

ments of due process of law under the Fourteenth Amendment to the United States Constitution, where the delinquent taxpayer, who had an opportunity to be heard upon the assessment, cannot fail, if he exercises due diligence, to learn of the pendency of the proceedings, and that full opportunity to defend is afforded to him.

The question presented on appeal is so insubstantial that no written opinion was given by the Mississippi Supreme Court, and the Appellant failed to file a Petition for rehearing before the full panel of the Mississippi Supreme Court.

IV.

CONCLUSION

Wherefore, Appellee respectfully submits that Appellant's property was not taken without due process of law under the Fourteenth Amendment to the United States Constitution and that the questions upon which this cause depends are so insubstantial as not to need further argument and Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Mississippi Supreme Court.

Respectfully Submitted,

Charles H. Reid per m.a.s.

Charles H. Reid
P.O. Box 1244
Hattiesburg, MS 39401
(601) 545 - 3113

CERTIFICATE OF SERVICE

I, Charles H. Reid, attorney for Appellee, M. Morris, in the above styled and numbered cause, do hereby certify that I have this day mailed via the United States mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to the Attorneys for Appellant: Honorable George Calvin Cochran, University, Mississippi and Thomas A. Pritchard, 232 Porter Ave., Biloxi, Mississippi, their usual and customary addresses.

I further certify that all parties required to be served pursuant to Rule 28 of the United States Supreme Court have been served.

SO CERTIFIED, this the 16th day of February, 1981.

Charles H. Reid pro se.

CHARLES H. REID